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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA

10 CHUTIMA UTHES SUTTON, ) Case No. ED CV 08-1659-PJW  
11 Plaintiff, )  
12 v. ) MEMORANDUM OPINION AND ORDER  
13 MICHAEL J. ASTRUE, )  
14 Commissioner of the )  
15 Social Security Administration, )  
16 Defendant. )  
17

18 I. INTRODUCTION

19 Before the Court is Plaintiff's appeal of a decision by Defendant  
20 Social Security Administration ("the Agency"), partially denying her  
21 application for Disability Insurance benefits ("DIB"). Plaintiff  
22 claims that the Administrative Law Judge ("ALJ") erred in: 1) finding  
23 that her medical condition improved after November 16, 2005;  
24 2) failing to properly consider her and her husband's testimony; and  
25 3) using the "Grids" at step five. (Joint Stip. at 3-6, 11-14, 19-  
26 23.) Because the Agency's decision that Plaintiff was not disabled  
27 within the meaning of the Social Security Act during the relevant  
28 period is not supported by substantial evidence, it is reversed and  
the case is remanded for further proceedings.

## 1 II. SUMMARY OF PROCEEDINGS

2 Plaintiff applied for DIB on July 14, 2005, alleging that she had  
3 been unable to work since October 30, 2003, because of a right ear  
4 problem, right elbow/arm numbness, and depression. (Administrative  
5 Record ("AR") 74, 93.) The Agency denied the application initially  
6 and on reconsideration. (AR 65-69, 74-78.) Plaintiff then requested  
7 and was granted a hearing before an ALJ. (AR 59-60, 63.) Plaintiff  
8 appeared with counsel and testified at the hearing on September 5,  
9 2007. (AR 25-53.) On September 21, 2007, the ALJ issued his  
10 decision, finding that Plaintiff was disabled and entitled to benefits  
11 for a "closed period" from October 30, 2003 to November 16, 2005, but  
12 that, thereafter, she was not disabled. (AR 17-22.) Plaintiff  
13 appealed to the Appeals Council, which denied review. (AR 5-9.) She  
14 then commenced the instant action.

## 15 III. DISCUSSION

16 1. The ALJ's Finding That Medical Improvement Occurred After  
17 November 16, 2005

18 In her first claim of error, Plaintiff contends that the ALJ's  
19 finding that her condition improved after November 16, 2005 was not  
20 supported by substantial evidence. Plaintiff points out that the  
21 ALJ's residual functional capacity determination for the closed  
22 period, i.e., that Plaintiff could perform light work but could not do  
23 work that required her to more than occasionally lift her right arm  
24 above shoulder level, was identical to the residual functional  
25 capacity determination for the period that followed. (Joint Stip. at  
26 4.) Plaintiff argues that "it is impossible to reconcile the ALJ's  
27 decision [that Plaintiff was disabled before November 17, 2005 but not  
28 after] with these two stated residual functional capacity

1 assessments." (Joint Stip. at 5.) Plaintiff further contends that  
2 there is no medical evidence to support these findings. (Joint Stip.  
3 at 5). She also argues that the ALJ erred in finding that she had no  
4 functional limitations as a result of her mental impairment. (Joint  
5 Stip. at 4-5.) For the following reasons, the Court concludes that  
6 the ALJ's residual functional determination is not supported by  
7 substantial evidence in the record.

8 The governing regulations provide that the responsibility for  
9 deciding a claimant's residual functional capacity is reserved to the  
10 Agency. 20 C.F.R. § 404.927(e)(2). Nevertheless, "a [residual  
11 functional capacity assessment] that fails to take into account a  
12 claimant's limitations is defective." *Valentine v. Comm'r, Soc. Sec.*  
13 *Admin.*, 574 F.3d 685, 690 (9th Cir. 2009). Furthermore, though the  
14 Agency's decision must be affirmed if it is supported by substantial  
15 evidence, meaning more than a mere scintilla but less than a  
16 preponderance, it may not be affirmed where the ALJ fails to set forth  
17 a "meaningful explanation," allowing the Court to assess the validity  
18 of the ALJ's reasons for reaching the decision. *Robbins v. Soc. Sec.*  
19 *Admin.*, 466 F.3d 880, 882, 884-85 (9th Cir. 2006).

20 Here, the ALJ failed to sufficiently explain his residual  
21 functional capacity findings. He found that Plaintiff's residual  
22 functional capacity for the closed period was the same as her residual  
23 functional capacity for the period that followed. The ALJ ostensibly  
24 found that in both that Plaintiff could do light work except work  
25 requiring greater than occasional lifting above shoulder level with  
26 her right arm. (AR 18, 20.) Thus, if Plaintiff was unable to work in  
27 the closed period, it stands to reason that she was unable to work in  
28

1 the period that followed. The ALJ's failure to explain this  
2 contradiction requires remand.

3 In addition, the ALJ's residual functional capacity finding  
4 differs from the residual functional capacity he used in the  
5 hypothetical question to the vocational expert. In the hypothetical,  
6 the ALJ asked the vocational expert to assume that Plaintiff had  
7 mental limitations, i.e., that she would be restricted to no more than  
8 occasional contact with the public and that she could not perform work  
9 that required her to be a "problem solver for other employees" or to  
10 "make complex management-type decisions" for employees. (AR 48.) The  
11 vocational expert concluded that such an individual could not perform  
12 any of Plaintiff's past work because "much of that work requires more  
13 than occasional contact with the public. [¶] And much of that work  
14 also requires more than occasional keyboarding with the dominant  
15 hand." (AR 49.) In other words, the vocational expert's conclusion  
16 that Plaintiff could not perform her past work was expressly based on  
17 two limitations that the ALJ did not include in his residual  
18 functional capacity findings in his written decision, one of which  
19 being, in fact, a mental limitation that was expressly rejected in  
20 that determination.

21 The vocational expert also testified that the hypothetical person  
22 could not perform any other work existing in the economy because  
23 "[o]ther work would require . . . more than occasional contact with  
24 the public, and other work would also require more than occasional  
25 bilateral hand activities[.]" (AR 49.) Once again, these limitations  
26 were not included in the ALJ's residual functional capacity  
27 determination in his written decision. Nevertheless, in finding that  
28 Plaintiff could not perform her past relevant work or any other work

1 during the closed period, it is clear that the ALJ relied on the  
2 vocational expert's testimony. (AR 19.)

3 The ALJ also misstated the vocational expert's testimony.  
4 According to the ALJ, "[t]he vocational expert [testified] that with  
5 limitations including no more than frequent use [of the right arm] for  
6 handling or fingering or repetitive use of the right hand for such  
7 things as prolonged keyboarding, the claimant could not perform past  
8 work." (AR 18.) This was not what the vocational expert said. As  
9 set forth above, the vocational expert testified that the hypothetical  
10 person could not perform Plaintiff's past work, or any other work,  
11 because such work would require "more than occasional contact with the  
12 public[,]" and because it would require "more than occasional  
13 keyboarding with the dominant hand." (RT 49-50.) The ALJ ignored  
14 this restriction in reaching his ultimate decision. (AR 18.)

15 Despite these problems, the Agency argues that any error  
16 committed by the ALJ in failing to incorporate these limitations in  
17 his findings was harmless because the ALJ ultimately relied on the  
18 vocational expert's testimony, which took into account all of  
19 Plaintiff's limitations. (Joint Stip. at 7-8.) To the extent that  
20 the errors bear solely on the ALJ's conclusion that Plaintiff was  
21 disabled during the closed period (for which, clearly, she cannot be  
22 granted any additional relief), the Court agrees. Nevertheless, the  
23 Court finds that these errors, along with other problems the Court  
24 identifies below, undermine the ALJ's residual functional capacity  
25 determination for the period following the closed period.

26 The ALJ provided the following justifications for his finding  
27 that Plaintiff's physical condition improved as of November 17, 2005:  
28 1) Plaintiff was provided wrist braces after complaining of pain, but,

1 after she took off the braces and her bra, she felt relief; 2) medical  
2 records from Kaiser Permanente showed that "by January and February  
3 2005 no significant findings were found on physical examination"; and  
4 3) an October 2005 consultative examiner diagnosed right  
5 epicondylitis, but found Plaintiff capable of performing light work,  
6 had grossly normal sensation, normal motor strength, normal range of  
7 motion in her elbows, and no evidence of carpal tunnel syndrome. (AR  
8 20.) As explained below, the Court concludes that these reasons do  
9 not constitute substantial evidence to support the ALJ's finding that  
10 Plaintiff's condition improved after November 16, 2005.

11 Plaintiff did not allege that she was disabled due to wrist pain.  
12 (AR 74.) Thus, the fact that she experienced relief from wrist pain  
13 after she removed her braces is immaterial to the issue of whether her  
14 condition improved after November 16, 2005. Moreover, Plaintiff  
15 explained in a written statement accompanying her DIB application that  
16 she took off the wrist braces and bra in 1995. (AR 102.) (She gave  
17 the same explanation to Dr. Hall, the medical examiner in her worker's  
18 compensation action. (AR 144.)) The ALJ failed to explain how the  
19 fact that Plaintiff took off the wrist braces in 1995 and experienced  
20 relief from pain at that time supported his findings that her  
21 condition improved in November 2005, particularly in light of the fact  
22 that he found that she was disabled from 2003 to 2005.

23 As to the January and February 2005 Kaiser Permanente Records,  
24 the ALJ's findings that these records support his finding that  
25 Plaintiff's condition improved nine months later is unsupportable,  
26 especially in view of his determination that the same records  
27 supported a finding that she was disabled until November 2005. If the  
28 ALJ believed that these records demonstrated that Plaintiff's

1 condition had improved, he should have ended the closed period at that  
2 time, not ten months later.

3 The ALJ's reliance on the October 2005 consultative medical  
4 examination also raises questions. Though this examination revealed  
5 that Plaintiff had greater use of her right arm and elbow as of that  
6 date, supporting the ALJ's finding that her condition had materially  
7 improved, the ALJ also used the examination results to conclude that  
8 Plaintiff was disabled up to November 16, 2005. (AR 18.) It is  
9 unclear to what extent the ALJ accepted the October 2005 consultative  
10 opinion, and to what end.

11 The Court reaches a similar conclusion regarding the ALJ's  
12 findings with respect to Plaintiff's mental impairment. In  
13 determining Plaintiff's residual functional capacity for the period  
14 after November 16, 2005, the ALJ did not find any mental limitations.  
15 Though the ALJ found that Plaintiff was diagnosed with a depressive  
16 disorder in September 2005, he noted that the examining psychiatrist,  
17 Dr. Woodard, found that Plaintiff would have only slight impairments  
18 withstanding normal stresses and pressures in the workplace;  
19 interacting with supervisors, coworkers, and the general public;  
20 maintaining concentration, persistence and pace; and performing  
21 detailed and complex tasks. (AR 20.) This was a mistake. Dr.  
22 Woodard actually found that Plaintiff would have "slight to moderate"  
23 impairment in withstanding normal stresses and pressures in the  
24 workplace and in completing a normal workweek without interruption.  
25 (AR 273.)

26 More significantly, it is unclear from his decision how the ALJ  
27 reconciled his reliance on the vocational expert's testimony that  
28 Plaintiff could not work because she had to avoid more than occasional

1 contact with the public with his finding that she had no mental  
2 limitations during the closed period, or whether he considered any  
3 such mental limitations with respect to the period following the  
4 closed period. As such, the Court is not in a position to say which,  
5 if any, mental limitations the ALJ considered in finding that  
6 Plaintiff's condition improved after November 16, 2005.

7 In sum, the Court finds that the ALJ's decision regarding  
8 Plaintiff's condition following the closed period is not supported by  
9 substantial evidence. On remand, the ALJ must reconsider the evidence  
10 and make findings regarding Plaintiff's limitations that permit  
11 judicial review.<sup>1</sup>

12 2. The ALJ's Credibility Determination

13 In her second claim of error, Plaintiff contends that the ALJ  
14 erred when he "inexplicably rejected" certain statements she made  
15 regarding her symptoms. (Joint Stip. at 11, 12.) Plaintiff argues  
16 that the ALJ failed to: 1) specify which parts of her testimony he  
17 found not credible, 2) consider the factors enumerated in Social  
18 Security Ruling 96-7p, and 3) provide clear and convincing reasons for  
19 rejecting her testimony. (Joint Stip. at 12-13.) Plaintiff also  
20 contends that the ALJ erred in failing to discuss her husband's  
21 submission. (Joint Stip. at 14.) For the following reasons, the  
22 Court agrees.

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25 <sup>1</sup> The Court also notes that the ALJ made no explicit findings  
26 regarding the requirements of Plaintiff's past work before concluding  
27 that she would be able to do that work. He did not ask the vocational  
28 expert to describe the requirements of the past work, nor did he  
attempt in his decision to show how Plaintiff's residual functional  
capacity would permit her to perform that work.



1 ALJ's are tasked with judging the credibility of witnesses.  
2 Where a claimant has produced objective medical evidence of an  
3 impairment which could reasonably be expected to produce the symptoms  
4 alleged and there is no evidence of malingering, the ALJ can only  
5 reject the claimant's testimony for specific, clear, and convincing  
6 reasons. *Smolen v. Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996). In  
7 making a credibility determination, the ALJ may take into account  
8 ordinary credibility evaluation techniques as well as the claimant's  
9 daily activities. *Id.* at 1284. If the ALJ's credibility finding is  
10 supported by substantial evidence in the record, the Court may not  
11 engage in second-guessing. *Thomas v. Barnhart*, 278 F.3d 947, 959 (9th  
12 Cir. 2002).

13 In a July 25, 2005 daily activities questionnaire, Plaintiff  
14 wrote that she could not continue working because she had to answer  
15 the telephone at least 100 times a day. (AR 103.) Plaintiff also  
16 complained that her right ear was ringing and in pain and that she  
17 experienced stress, fatigue, dizziness, sleeplessness, and shortness  
18 of breath. (AR 103.) Plaintiff claimed that her right elbow hurt and  
19 her fingertips were numb, which required that she use a pen to type,  
20 one key at a time. (AR 103.)

21 At the September 2007 hearing, Plaintiff testified that, when she  
22 used her right arm a lot, it grew numb between her fingers and right  
23 elbow, causing her to lose strength. (AR 36.) She testified that she  
24 used a pen to type to avoid this problem. (AR 36.) Plaintiff claimed  
25 that repeatedly lifting the telephone to answer it aggravated her  
26 elbow pain, but that she could not use headphones because of pain in  
27 her right ear. (AR 37.) She explained that she was required to use  
28 the phone and type "all day long, eight hours a day" at her previous

1 job. (AR 37-38.) Plaintiff also testified that she had calmed down  
2 since she had not been working, but that she still cried every day.  
3 (AR 38.)

4 In his decision, the ALJ found that Plaintiff's statements  
5 concerning the limiting effects of her symptoms were not credible  
6 based, in part, on the fact that Dr. Hall, a medical examiner in  
7 Plaintiff's worker's compensation case, found that Plaintiff "may well  
8 have a tendency to somatize and that [she] has exaggerated her  
9 symptoms for effect." (AR 18.) The ALJ also found that Plaintiff's  
10 testimony was exaggerated in that she claimed that she was depressed  
11 but did not use antidepressant medication or therapy, and because she  
12 "enjoys golfing as a recreational activity and recently traveled to  
13 Thailand." (RT 18.)

14 Thereafter, the ALJ set out the requirements of 20 C.F.R.  
15 § 404.1527 and the social security rulings, which contain the  
16 framework for addressing credibility issues. But, the ALJ did not  
17 explain how the facts of this case when analyzed under that framework  
18 established that Plaintiff was not credible. (AR 20-21.)

19 Despite these failures, as discussed above, the ALJ's reliance on  
20 the vocational expert's testimony in concluding that Plaintiff was  
21 disabled during the closed period means that the ALJ must have  
22 accepted that Plaintiff was limited in her ability to use a keyboard  
23 and in her ability to interact with the public, solve problems for  
24 colleagues, and make complex decisions. Thus, for example, if the ALJ  
25 had agreed with Dr. Hall's opinion that Plaintiff had a tendency to  
26 somatize and had exaggerated her symptoms for effect, the ALJ would  
27 have either found that Plaintiff was malingering or not accepted the  
28 limitations that she testified to.

1       Once again, because the residual functional capacity  
2 determination is unclear, it is difficult to understand to what extent  
3 the ALJ might have actually accepted Plaintiff's testimony, at least  
4 in part; to what extent the ALJ relied on Dr. Hall's opinion to reject  
5 Plaintiff's testimony; and, moreover, given that he made no additional  
6 findings for the period following the closed period, to what extent  
7 the ALJ's credibility findings differed between the closed period of  
8 disability and the period that followed. On remand, the ALJ should  
9 make clear credibility findings and, if he finds that Plaintiff's  
10 testimony is not credible, he should set forth his reasons for this  
11 finding.<sup>2</sup>

12       The Court also agrees with Plaintiff that the ALJ erred in  
13 failing to address Plaintiff's husband's written submission regarding  
14 Plaintiff's limitations in lifting, understanding, and concentrating.  
15 (AR 106-13.) See *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d 1050,  
16 1053 (9th Cir. 2006) (stating that "an ALJ must consider lay witness  
17 testimony concerning a claimant's ability to work," and remanding for  
18 the ALJ to address it); *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th  
19 Cir. 1993) (holding that ALJ must give germane reasons to discount  
20 written testimony and affidavits of lay witnesses). Further, the  
21 Court cannot conclude that the error was harmless. *Stout*, 454 F.3d at  
22 1056 ("[W]e hold that where the ALJ's error lies in a failure to  
23 \_\_\_\_\_

24       <sup>2</sup> Because it is not clear whether the ALJ's credibility findings  
25 apply, the Court does not decide whether they were sufficiently clear  
26 and convincing. Nevertheless, the Court questions whether the ALJ  
27 properly relied on Plaintiff's failure to use antidepressant  
28 medication, in light of her repeated testimony that she was allergic  
to the medication. (AR 41-42, 44.) Additionally, on remand, if  
necessary, the ALJ should explain how Plaintiff's ability to travel to  
Thailand undermines her testimony that her right arm causes her pain.

1 properly discuss competent lay testimony favorable to the claimant, a  
2 reviewing court cannot consider the error harmless unless it can  
3 confidently conclude that no reasonable ALJ, when fully crediting the  
4 testimony, could have reached a different disability determination." ).  
5 Though it is a close call because Plaintiff's husband does not offer  
6 much to establish that Plaintiff is incapable of working, the Court  
7 finds that there is enough there, particularly in the last three pages  
8 of the husband's report, to conclude that a reasonable ALJ might have  
9 found that Plaintiff was disabled. (AR 111-13.) On remand, the ALJ  
10 should address this testimony.

11 3. Application Of Medical-Vocational Rule No. 202.08

12 In her third claim of error, Plaintiff contends that the ALJ  
13 erred when he used the wrong Grid rule (Rule No. 202.08 instead of  
14 202.06). (Joint Stip. at 19-23.) There is no merit to this claim.

15 Grid Rule No. 202.08 directs a finding of "not disabled" for an  
16 individual of advanced age, i.e., 55 or over, with at least a high  
17 school degree that "provides for direct entry into skilled work," who  
18 is limited to light work, but who has no transferable skills. See 20  
19 C.F.R. Pt. 404, Subpt. P, Table No. 2, Rule No. 202.08. Plaintiff  
20 argues that the ALJ should not have relied here on this rule because  
21 she obtained a college degree in Thailand over thirty years ago, and  
22 there is no evidence that her education will allow her direct entry  
23 into skilled work. (Joint Stip. at 19-20.) Rather, Plaintiff  
24 contends, the ALJ should have used Grid Rule No. 202.06, which applies  
25 to an individual whose education "does not provide for direct entry  
26 into skilled work," and which directs a finding of disabled. (Joint  
27 Stip. at 19-20.) Whatever merit in general Plaintiff's argument might  
28 have with respect to the proper application of the Grid rules, it does

1 not require remand in this case because the ALJ's decision was not  
2 based on the rules.

3 The ALJ invoked the Grids as a framework for decision-making in  
4 determining whether Plaintiff was disabled between October 30, 2003  
5 and November 16, 2005. (AR 19.) The ALJ then noted, however, that  
6 Plaintiff was not able to perform a full range of light work owing to  
7 additional limitations and, therefore, relied on the vocational  
8 expert's testimony, not the Grids, to conclude that Plaintiff was  
9 disabled. (AR 19.) Thus, any error that the ALJ committed by  
10 discussing the applicability (or inapplicability) of the Grids for the  
11 closed period could not have prejudiced Plaintiff because the ALJ's  
12 decision was not dependent on them and, further, because he found that  
13 Plaintiff was disabled. See *Booz v. Sec'y of Health & Human Servs.*,  
14 734 F.2d 1378, 1379-80 (9th Cir. 1984) (holding any error by ALJ in  
15 applying the Grids was harmless because the exercise was  
16 "unnecessary").

17 As for the ALJ's determination that Plaintiff was not disabled  
18 after November 16, 2005, this finding, too, was not based on the  
19 Grids. The ALJ found at step four of the sequential disability  
20 analysis that Plaintiff could do her past relevant work as a  
21 disability insurance program representative and an employment program  
22 representative. (AR 21-22.) Thus, any discussion of the Grids  
23 regarding the post-disability period was not error, either. See,  
24 e.g., *Crane v. Shalala*, 76 F.3d 251, 255 (9th Cir. 1996) (holding that  
25 ALJ did not err in failing to call vocational expert at step five  
26 after determining at step four that claimant could perform past  
27 relevant work).

IV. CONCLUSION

For these reasons, the Agency's decision is reversed and the case is remanded for further proceedings consistent with this memorandum opinion and order.

IT IS SO ORDERED.

DATED: February 25, 2010.

A handwritten signature in dark ink, reading "Patrick J. Walsh". The signature is written in a cursive, flowing style. The first name "Patrick" is written with a large, prominent "P". The middle initial "J." is smaller and follows the first name. The last name "Walsh" is written with a large, prominent "W".

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PATRICK J. WALSH  
UNITED STATES MAGISTRATE JUDGE